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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM G. MCELROY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

AND OTHER CASES

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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December 1994

QUESTION PRESENTED

WHETHER THE INSTRUCTIONS ON VESTED BENEFITS GIVEN AT TRIAL BY THE MILITARY JUDGES IN QUESTION WERE INACCURATE, VIOLATIVE OF THE COLLATERAL CONSEQUENCES RULE AND, IN ADDITION, A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 5TH AMENDMENT OF THE UNITED STATES CONSTITUTION

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

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ANTHONY P. DUCHINSKY, United States Air Force
USCAAF Dkt No. 93-0963/AF

JOSEPH B. OWENS, United States Air Force
USCAAF Dkt No. 93-1323/AF

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USCAAF Dkt No. 94-1189/AF

MICHAEL F. HEBERT, United States Air Force
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PETITION FOR WRIT OF CERTIORARI

The petitioners, William G. McElroy, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces in *United States v. McElroy*, 40 M.J. 368 (C.M.A. 1994) is reprinted as Appendix A. The unreported decision of the United States Air Force Court of Criminal Appeals in *United States v. McElroy*, issued

on March 24, 1993 is attached as Appendix B. The final order of the United States Court of Appeals for the Armed Forces affirming the decision of the Air Force Court of Criminal Appeals in *United States v. Duchinsky*, —— M.J. —— (C.M.A 1994) is reprinted at Appendix C. The final order of the United States Court of Appeals in *United States v. Owens*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix D. The final order of the United States Court of Appeals in *United States v. Martz*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix E. The final order of the United States Court of Appeals in *United States v. Hebert*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix F.

JURISDICTION

The final orders of the United States Court of Appeals for the Armed Forces were entered between 19 September 1994 and 5 October 1994. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

This is a consolidated petition representing interested service members of various ranks from the United States Air Force whose convictions were affirmed by the United States Court of Appeals for the Armed Forces between 19 September and 5 October 1994 based on its decision in *United States v. McElroy*. (Appendix A). In each of the five cases, the members of the court-martial panel were improperly instructed by the military judge that veterans benefits from previous periods of honorable service were "vested". In each case, this instruction was given after testimony was presented to the members that the accused had a previous period of honorable service. By way of example, in *United States v. McElroy*, the military judge instructed the members in pertinent part as follows:

> This court can adjudge a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one

> of substantially all benefits administered by the Department of Veterans Affairs and for that matter by the Department of the Air Force that are based on the current term of service. *However, vested benefits from a prior period of honorable service are not forfeited by a receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.*

R. 173, emphasis added. In a previous opinion on this instruction, *United States v. Longhi*, 36 M.J. 988 (A.F.C.M.R. 1993), the Air Force Court of Criminal Appeals noted that, while the use of the term "vested" was not technically correct, the "essence" of the instruction was. 36 M.J. at 989. In *United States v. McElroy*, 40 M.J. 368 (C.M.A. 1994) (Appendix A), the United States Court of Appeals for the Armed Forces, affirmed the position of the Air Force Court of Criminal Appeals in *Longhi* and *McElroy* by holding that it was not persuaded that such an instruction would clearly or substantially mislead the members. 40 M.J. at 372.

REASON FOR GRANTING THE WRIT

THE INSTRUCTIONS ON VESTED BENEFITS GIVEN AT TRIAL BY THE MILITARY JUDGES IN QUESTION WERE INACCURATE, VIOLATIVE OF THE COLLATERAL CONSEQUENCES RULE AND, IN ADDITION, A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 5TH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Instructions Were Inaccurate

In a letter issued from the Office of the General Counsel, Department of Veterans Affairs, Mr. John H. Thompson, Assistant General Counsel, made pointedly clear that there is no such thing as "vested benefits." This is in stark contrast to the judges' erroneous instructions in these cases which affirmatively advised the members that the appellants' prior periods of honorable service had caused cer-

tain benefits to "vest." The military judges' advice to the members that said benefits were "vested" materially prejudiced the respective appellants. In each case, the members were misled into believing that adjudicating punitive discharges against the appellants would not effect their ultimate receipt of their veterans benefits.

An accused is entitled to the members receiving a correct instruction if the military judge endeavors to give one. Unlike the issue in *United States v. Goodwin*, 33 M.J. 18 (C.M.A. 1991), the military judges in the cases at bar gave incorrect instructions, rather than omitted the instruction regarding the benefits administered by the Veterans' Administration. *Id.* at 19. Accordingly, the military judges committed plain error. *United States v. Young*, 105 S. Ct. 1038 (1985); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). The appellants were entitled, "and ha[d] a right to a fair trial in accordance with the Uniform Code of Military Justice" *United States v. Rowe*, 11 M.J. 11, 13 (C.M.A. 1981). The judges' erroneous instructions deprived them of this right.

B. The Instructions Violated The Collateral Consequences Rule

In addition to being just plain incorrect, the military judges' instructions on purportedly "vested" benefits clearly runs afoul of the collateral consequences rule: "The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.' " *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988). *cert. denied*, 487 U.S. 1206 (1988); *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988); *United States v. Quesinberry*, 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962). Clearly, the instruction in question is solely

concerned with collateral administrative consequences, namely, administrative benefits administered by the Veterans Administration. Under established precedent, there is simply no reason for a military judge to be getting into such an area of the law during a sentencing proceeding, except perhaps, to benefit the government in increasing the likelihood of a punitive discharge.

C. The Instructions Violated The Equal Protection Clause Of The 5th Amendment Of The United States Constitution

Lastly, appellants would also submit that the instructions given by the military judges also violated the Equal Protection Clause of the Fifth Amendment since they ironically placed individuals with previous Honorable Discharges in worse positions than those individuals without such periods of prior honorable service! In other words, common sense dictates that a panel would be much more willing to discharge an individual if it believed that that individual would not be deprived of his or her veteran's benefits. Clearly, the instructions given by the military judges in the cases *sub judice* were not designed to benefit the respective appellants. On the contrary, such an instruction could only benefit the prosecution by removing a psychological barrier to discharging people who are clearly in need of their Veterans' Administration benefits. Accordingly, the dissimilar treatment afforded the petitioners and those individuals without such previous Honorable Discharges violates the Equal Protection clause of the Fifth Amendment.

CONCLUSION

By giving the inaccurate, constitutionally defective instructions concerning the collateral administrative consequences of a punitive discharge, the military judges in the cases *sub judice*, virtually guaranteed that the respective appellants would be punitively separated from the Air Force. These erroneous instructions, which rise to the level of plain error, will have significant, negative, life long consequences for each of the appellants concerned. Consequently, this Honorable Court should grant this petition for a writ of certiorari and give clear guidance to the military justice system with regard to the extent that instructions to members should be concerned with the collateral, administrative consequences of a criminal conviction.

Respectfully submitted,

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